

Federal Communications Commission

DA 03-2830

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73 622(b),) MM Docket No 01-244
Table of Allotments,) RM-10234
Digital Television Broadcast Stations)
(Tyler, Texas))

In the Matter of)
)
Amendment of Section 73 622(b),) MM Docket No. 01-245
Table of Allotments,) RM-10235
Digital Television Broadcast Stations)
(Lufkin, Texas))

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 4, 2003

Released: September 12, 2003

By the Chief, Video Division

1 The Commission has before it a Petition for Reconsideration filed by International Broadcasting Network ("IBN"), a low power television licensee, of the *Report and Order* ("R&O") 17 FCC Rcd 19452 (2002), which substituted DTV channel 10 for DTV channel 38 at Tyler, Texas, and DTV channel 11 for DTV channel 43 at Lufkin, Texas.¹ IBN filed a Request for Stay: CivCo, Inc. ("CivCo" formerly Civic License Holding Company, Inc.), permittee of stations KLTV-DT (Tyler, Texas) and KTRE-DT (Lufkin, Texas) filed an Opposition to the Request for Stay.² CivCo filed an opposition to the petition for reconsideration. IBN filed a

¹ Public Notice of the Petition for Reconsideration was given on December 16, 2002, Report No. 2588

² IBN's request for a stay of the effective date of the R&O was denied by the Chief of the Video Services Division, acting under the authority delegated in Section 0.283 of the Commission's rules. Pursuant to Section 1.106 of the Rules, Petitions for Reconsideration are dealt with by the same authority that made the decision.

IBN's argues that it is entitled to the stay as a matter of right under Section 1.102(a)(2). However, that subsection applies only to "final actions following review of an initial decision." In non-hearing decisions taken pursuant to delegated authority like this one, Section 1.102(b) applies. That provision gives the designated authority the discretion to grant a stay. 37 CFR 1.102(b)(2). IBN's request for stay was properly weighed under that provision, and we determined that there is no basis for granting the request. Accordingly, IBN's Petition for Reconsideration of the Stay decision is denied.

reply to CivCo' s opposition

BACKGROUND

2 At the request of CivCo, the Commission issued a *Notice of Proposed Rule Making*, 6 FCC Rcd 16687 (2001), proposing the substitution DTV channel 10 for station KLTV(TV)' s assigned DTV channel 38 at Tyler, Texas, and, other *Notice of Proposed Rule Making*, 16 FCC Rcd 16692 (2001), proposing the substitution of DTV channel 11 for station KTRE(TV)' s assigned DTV channel 43 at Lufkin, Texas. The deadline for filing initial comments and reply comments in both proceedings was November 13, 2001, and November 28, 2001, respectively. For purposes of administrative efficiency, the two proceedings were consolidated.

3. Several parties, including IBN filed initial comments in the proceeding.³ CivCo and IBN filed reply comments.

THE PLEADINGS

4 In its petition for reconsideration, IBN states that the *R&O* was issued by the Chief of the Video Division of the Media Bureau, a decision-maker that IBN believes may lack impartiality because IBN is an evangelical Christian organization. IBN also claims that this individual' s misconduct was alleged in a previous proceeding, which ultimately was the subject of judicial review by the Court of Appeals.

5 IBN contends that the *R&O* either ignored or rejected everything all parties other than CivCo said in their comments. IBN also argues that CivCo failed to provide IBN with proper notice regarding various documents. It asserts that the Commission' s endorsement of CivCo cooperative spirit is unjustified and lacks factual basis. IBN claims that the Commission is prohibited from taking property without due process and just compensation pursuant to the Constitution of the United States. IBN also maintains that the Equal Protection Clause of the Constitution may apply noting that the Commission should not treat IBN' s stations less important or less worthy of protection than CivCo' s stations. Finally, IBN states that there is no statutory or regulatory provision that requires the Commission to grant CivCo' s channel substitutions.

6 CivCo states that throughout this proceeding, IBN has refused to accept the Commission' s well established and consistently applied rules that lower power television stations are secondary services and must give way to full-power stations. CivCo states that Congress made only one limited exception to this longstanding policy when it established the Class A low power television service, noting that none of IBN' s stations are eligible for Class A status. CivCo indicates that it has identified other channels for the IBN LPTV stations, but IBN has refused to apply for displacement relief. CivCo reiterates that IBN' s low power stations have

³ In response to the *Notices*, Lee Miller, David Sharp, Richard L. Rambin, C. Dwyan Calver and Bert McKinney filed initial comments.

no legal basis for protection against changes to the operations of full-power broadcast stations

7 CivCo further refutes IBN's claims of improper Commission conduct. CivCo asserts that IBN provides no evidence to support its outlandish speculations of improper conduct and incorrect outcome. CivCo contends that the Commission's own rules and policies compelled the decision in this proceeding, noting that the decision itself stands as the strongest evidence that the agency did not exercise any bias nor act improperly. CivCo, in the same reply, states that IBN's reliance on constitutional arguments is misplaced. CivCo expressly states that Section 301 of the Communications Act provides that no license granted pursuant to the act "shall be construed to create any right beyond the terms, conditions, and periods of the license." CivCo argues that the courts have long held that licensees have no property interest in their licenses beyond the terms of the licenses themselves, citing, *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985); and *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). Finally, CivCo submits that IBN raises a hodgepodge of items that are misleading, inaccurate, and irrelevant to this proceeding.

DISCUSSION

8 In opposing the channel substitutions, IBN argued that the proposed channel changes would result in its low power stations in Longview and Lufkin being displaced. In rejecting IBN's opposition, the Commission found that approval of the substitution proposals would permit stations KIBN-LP and KLGV-LP to avoid potential loading problems and reduce DTV build-out costs. Moreover, the Commission found that IBN, specifically, did not raise any persuasive reasons for denying CivCo's requests. As a low power television station, the Commission found, IBN's facility was a secondary user and not entitled to protection from a full power facility. It was also noted that CivCo had identified replacement channels and apparently offered assistance to IBN to relocate to those channels.

9 On reconsideration, IBN provides little more than a rehashing of its previous contentions that somehow CivCo's DTV proposals must protect its low power facilities. It is so well established that low power stations are secondary to full power stations that we need not discuss IBN's contentions further. See *Advance Television Systems and Their Impact Upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd. 7418 (1998). CivCo offered to assist IBN in identifying replacement channels and assistance in relocating to those channels. This cooperative spirit by CivCo was apparently rejected by IBN. IBN has offered no information or made any valid or persuasive argument to support reversal of our decision.

10 Section 1.429 of the Commission's Rules set forth the limited provisions under which the Commission will reconsider a rule making action. Reconsideration is warranted only if the petitioner cites error of fact or law, or he presents facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. The Commission will not reconsider arguments that have already been considered. See

Eagle Broadcasting Co. v. FCC, 514 F.2d 852 (D C Cir 1975). The only new facts offered by IBN are nothing more than an unsupported accusation regarding the Commission's decision-maker and the misconstruction of IBN's constitutional and property rights. Furthermore, IBN has not shown any facts that the Commission previously failed to consider errors with respect to the facts or law. Rather, IBN has simply repeated the arguments initially advanced in this proceeding. Thus, there is no basis to set aside our earlier decision, which allotted DTV channel 10 and DTV 11 to Tyler and Lufkin, Texas. Accordingly, we affirm the allotment plan set forth in the *Report and Order*.

11. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by International Broadcasting Network IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Pam Blumenthal, Media Bureau, (202) 418-1600.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau